No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC.,
LAMPS PLUS CENTENNIAL, INC.,
LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO ORDER CLASS ARBITRATION WHEN, AS HERE, TWO PARTIES HAVE SIMPLY AGREED TO ARBITRATE THEIR DISPUTES. 4

A. *Stolt-Nielsen v. Animal Feeds* Requires A "Contractual Basis" Authorizing Class Arbitration, Which Cannot Be Found In The Parties' Basic Agreement To Arbitrate Their Disputes. 4

B. The Ninth Circuit Erroneously "Found" A Contractual Basis In Contract Language That Merely Provides The Employee With Express Notice Of the Consequences of Agreeing To Arbitrate Disputes With His Employer. 6

C. In Effect, The Ninth Circuit's Decision Would Erroneously Impose Class Arbitration As A Mandatory Implied Term In Any Standard Bilateral Arbitration Agreement That Did Not Expressly Preclude It. 11

D. In Addition To *Stolt-Nielsen*, The Court Effectively Decided, In *Oxford Health v. Sutter*, That There Can Be No Contractual Basis Authorizing Class Arbitration In A Standard Bilateral Arbitration Agreement Such As This One. 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Armendariz v. Found. Health Psychcare Servs., Inc.,
6 P.3d 669 (Cal. 2000) 9

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 11

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 12

Kindred Nursing Centers Ltd. P'ship v. Clark,
137 S. Ct. 1421 (2017) 9

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013) ..... *passim*

Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.,
559 U.S. 662 (2010) ..... *passim*

STATUTES

9 U.S.C. § 1 *et seq.* 4

9 U.S.C. § 10(a)(4) 13, 14

Cal. Bus. & Prof. Code § 7191 10

Cal. Civ. Proc. Code § 1295 10

OTHER AUTHORITIES

Reply to Answer to Petition for Review of Appellate Court Decision,
Reynolds v. Cornerstone Staffing Solutions Inc.,
(Cal.) (No. S147370) (*review denied* Nov. 29, 2006),
2006 WL 3886802 9

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) seeks to present its views, and the views of its supporters, on the issue whether the Federal Arbitration Act (FAA) permits a court to order two parties who have entered into a standard arbitration agreement to submit to class arbitration, when the agreement makes no mention of class procedures and merely provides that the two parties have agreed to arbitrate their disputes.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to the use of arbitration as a contractual alternative to litigation for the resolution of disputes. In this respect,

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amicus states that counsel of record for each party has consented to the filing of this amicus brief.

NELF is committed to the FAA's related principles that arbitration agreements should be enforced according to their terms, and that arbitration is a matter of consent, not coercion. When, as here, two parties have simply agreed to arbitrate their disputes, the FAA does not permit a court to impose class arbitration.

In addition to this amicus brief, NELF has filed several other amicus briefs in this Court in cases arising under the FAA, arguing for the enforcement of arbitration agreements according to their terms.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

The standard arbitration agreement in this case, between an employer and one of its employees, makes no mention of class procedures. It is a simple agreement between the two parties to arbitrate their disputes, and nothing more. It therefore fails to provide the necessary "contractual basis" authorizing class arbitration, as required by the Federal Arbitration Act (FAA) and *Stolt-*

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

Nielsen S.A. v. AnimalFeeds Internat'l Corp., 559 U.S. 662 (2010).

The Ninth Circuit erroneously "found" a contractual basis authorizing class arbitration in contract language that merely provides the employee with express notice that, by agreeing to arbitrate with his employer, he has waived his right to sue his employer in court. That contract language adds nothing new to the agreement and simply explains to the employee what it means to agree to arbitrate disputes with his employer. Therefore, it cannot provide a contractual basis authorizing class arbitration.

If allowed to stand, the Ninth Circuit's decision would effectively impose class arbitration as a mandatory implied term in any standard bilateral arbitration agreement that did not expressly preclude it. This would contravene the FAA and the Court's recent decisions interpreting the FAA.

In addition to *Stolt-Nielsen*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), effectively decided the issue raised in this case. There, the Court was also faced with a standard bilateral arbitration agreement that made no mention of class proceedings. However, in *Oxford Health*, the parties had submitted the issue of class arbitration to the *arbitrator* to decide. Therefore, the Court had to affirm the arbitrator's erroneous award of class arbitration, because the FAA did not permit it to review the arbitrator's decision for mistakes of law or fact.

But the Court made it clear throughout its opinion in *Oxford Health* that the arbitrator had erred in finding a contractual basis authorizing class arbitration in a simple bilateral arbitration agreement, such as the one at issue here. In this case, the Court is free to do what it could not do in *Oxford Health*, namely to reject an erroneous interpretation of a standard bilateral arbitration agreement under *Stolt-Nielsen*.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT DOES NOT PERMIT A COURT TO ORDER CLASS ARBITRATION WHEN, AS HERE, TWO PARTIES HAVE SIMPLY AGREED TO ARBITRATE THEIR DISPUTES.

A. *Stolt-Nielsen v. Animal Feeds* Requires A "Contractual Basis" Authorizing Class Arbitration, Which Cannot Be Found In The Parties' Basic Agreement To Arbitrate Their Disputes.

At issue is whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), permits a court to order class arbitration when two parties have simply agreed to arbitrate their disputes. The standard arbitration agreement in this case makes no mention of class procedures. Appendix to Petition for Certiorari (App.) 24a-35a. Instead, it is a simple *bilateral* agreement, signed by the petitioner, Lamps Plus, Inc., and one of its

employees, the respondent Frank Varela, to resolve "any and all disputes . . . arising out of or relating to . . . the employment relationship *between the parties* . . . by final and binding arbitration as the exclusive remedy." App. 24a (emphasis added). *See also id.* at 28a.[3]

In *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662 (2010), this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is *a contractual basis* for concluding that the party *agreed* to do so." *Id.*, 559 U.S. at 684 (emphasis added and in original). This means that when, as here, two parties have "simply agree[d] to submit their disputes to an arbitrator," *Stolt-Nielsen*, 559 U.S. at 685, they have *not* also implicitly agreed to arbitrate their disputes on a classwide basis. "An implicit agreement to authorize class-action arbitration . . . is not a term that the [court or]

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[3] The first paragraph of the parties' arbitration agreement provides:

> Except as provided below, the parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy.

App. 24a.

arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.*[4]

Consent to class arbitration would therefore require additional language in the arbitration agreement, quite apart from language stating that the two parties have agreed to submit "any and all disputes . . . [to] final and binding arbitration as the exclusive remedy." App. 24a. But the parties' arbitration agreement in this case is completely silent on the issue of class arbitration and, therefore, fails to provide the necessary contractual basis under the FAA.

B. The Ninth Circuit Erroneously "Found" A Contractual Basis In Contract Language That Merely Provides The Employee With Express Notice Of the Consequences of Agreeing To Arbitrate Disputes With His Employer.

Notwithstanding *Stolt-Nielsen*'s clear directive, and the agreement's utter silence on the issue of class arbitration, a divided panel of the Ninth Circuit nevertheless held that the agreement indicated Lamps Plus's consent to classwide proceedings. App. 2a-5a. In particular, the court

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[4] "This is so because class-action arbitration changes the nature of [one-on-one] arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685.

purported to find a contractual basis in certain language contained in the second and third paragraphs of the parties' agreement. App. 3a-4a.[5]

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[5] The second and third paragraphs of the agreement provide:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.
>
> Claims Covered by the Arbitration Provision
>
> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement. The only claims that are arbitrable are those that, in the absence of this Agreement, would have been available to the parties by law. The claims covered by this Agreement include, but are not limited to, claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability (including claims under the California Fair Employment and

Turning to the second paragraph, for example, the court stated (with apparently unintended irony) that "[i]t requires no act of *interpretive acrobatics* to include class proceedings as part of a 'lawsuit or other civil legal proceedings,'" all of which Varela agreed to substitute with arbitration in the first paragraph. App. 3a (emphasis added). In the lower court's view, the language of the second and third paragraphs created an ambiguity on the issue of class arbitration, and any ambiguity should be construed against the drafter, Lamps Plus, under California law. App. 4a.

But the Ninth Circuit erred because the second and third paragraphs add nothing new to the parties' agreement. They merely provide Varela with express notice of the consequences of agreeing with Lamps Plus, in the first paragraph, to resolve "any and all disputes . . . by final and binding arbitration as the exclusive remedy." App. 24a. Specifically, the second paragraph explains to Varela that he has waived his right to pursue all

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> Housing Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and any other local, state or federal law concerning employment or employment discrimination). This agreement does not affect the Employee's right to seek relief through the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing.

App. 24a-25a.

arbitrable disputes in court. *Id.* And the third paragraph, appearing under the heading "Claims Covered by the Arbitration Provision," provides Varela with a detailed illustrative list of those arbitrable disputes. *Id.* at 25a.

Far from authorizing class arbitration, then, the second and third paragraphs simply apprise Varela of "the primary characteristic of an arbitration agreement--namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). Those paragraphs merely explain to Varela what it means to "agree that any and all disputes . . . shall be resolved by final and binding arbitration as the exclusive remedy."[6]

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[6] Indeed, Lamps Plus probably included the second and third paragraphs to ensure the enforceability of its arbitration agreement with Varela under California law. When the agreement was executed, in 2007, App. 28a, the California Supreme Court had raised, but had left unanswered, the question whether California employers must provide employees with express notice of jury waiver in an arbitration agreement such as this one. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 680 n.7 (Cal. 2000) (declining to answer "[t]he question whether the arbitration agreement," requiring employees to submit future disputes about termination to binding arbitration, "was sufficient to permit the employees to knowingly waive the right to a jury trial," because question not preserved in petition for review). *See also* Reply to Answer to Petition for Review of Appellate Court Decision at 1, *Reynolds v. Cornerstone Staffing Solutions Inc.*, (Cal.) (No. S147370) (*review denied* Nov. 29, 2006), 2006 WL 3886802 at *1 ("Only this [California Supreme] Court can definitively answer the question of whether express notice of jury waiver is required for an enforceable mandatory arbitration contract in the context of adhesion. Employers and their counsel need resolution of

Therefore, the Ninth Circuit erred when it identified a contractual basis authorizing class arbitration in the basic notice provisions of Lamps Plus's arbitration agreement with Varela. Contrary to the court's view, that notice language "le[aves] no room for an inquiry regarding the parties' intent" on the issue of class arbitration. *Stolt-Nielsen*, 559 U.S. at 676. *See also* App. 5a ("[T]he Agreement was not ambiguous.") (Fernandez, J., dissenting).

In short, the lower court "[i]mproperly inferred 'an implicit agreement to authorize class-

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this question--one expressly left open in *Armendariz v. Foundation Health Psychcare Services* . . . .").

Similarly, California statutes repeatedly require businesses to include an express notice of waiver of the right to sue in court and obtain a jury trial in certain kinds of consumer arbitration agreements. *See, e.g.*, Cal. Bus. & Prof. Code § 7191 (requiring arbitration provision contained in contract for work on residential property with four or fewer units to state that "YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL."); Cal. Civ. Proc. Code § 1295 (requiring arbitration provision contained in medical services contract to state that "BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL.").

Whether or not the FAA might preempt such contract drafting requirements is not the issue here. Instead, the issue is whether an employer such as Lamps Plus would have deemed it necessary at the time to include such contract language in order to ensure the enforceability of its arbitration agreement with an employee under California law.

action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685). Accordingly, the Ninth Circuit's decision should be reversed, and Varela should be required to arbitrate his claims on an individual basis only.

C. In Effect, The Ninth Circuit's Decision Would Erroneously Impose Class Arbitration As A Mandatory Implied Term In Any Standard Bilateral Arbitration Agreement That Did Not Expressly Preclude It.

If allowed to stand, the Ninth Circuit's decision would effectively impose class arbitration as a mandatory implied term in any agreement to arbitrate disputes that did not expressly preclude class proceedings, despite *Stolt-Nielsen*'s clear holding to the contrary. *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA."). Under the lower court's approach, an employer or other business could face the risk of class arbitration as soon as it put pen to paper (or the modern-day equivalent) to draft a boilerplate arbitration agreement with another party, such as the agreement at issue here.

As a result, businesses would be loath to choose arbitration if it exposed them to such a risk.

Clearly, the FAA was not intended to cause such undesirable results. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

D. In Addition To *Stolt-Nielsen*, The Court Effectively Decided, In *Oxford Health v. Sutter*, That There Can Be No Contractual Basis Authorizing Class Arbitration In A Standard Bilateral Arbitration Agreement Such As This One.

In addition to *Stolt-Nielsen*, this Court effectively decided the issue presented in this case in *Oxford Health*. In that case, as in this case, the Court was faced with a standard bilateral arbitration agreement that made no mention of class proceedings. *See Oxford Health*, 569 U.S. at 566.[7] In that case, however, the parties had submitted the issue of class arbitration to the

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[7] The arbitration provision at issue in *Oxford Health* stated:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

Oxford Health, 569 U.S. at 566.

arbitrator to decide. *See id.* As with the Ninth Circuit in this case, the arbitrator in *Oxford Health* "found" a contractual basis authorizing class proceedings. *See id.* at 566-67. Oxford Health then moved to vacate the arbitrator's decision under the FAA, arguing that the arbitrator had "exceeded [his] powers" under 9 U.S.C. § 10(a)(4).[8] *Id.* at 568.

The Court affirmed the arbitrator's award of class arbitration, explaining that § 10(a)(4) did not permit it to review his decision for errors of law or fact. *See id.* at 568-73. Even though its hands were tied by the FAA's limited standard of review, the Court nonetheless made it clear, throughout its opinion, that the arbitrator had erred in finding a contractual basis authorizing class arbitration in a simple bilateral arbitration agreement. "[The arbitrator] went against Oxford, maybe *mistakenly so*. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed

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[8] That subsection of the FAA provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> . . .
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(4).

the parties' contract *correctly*, but whether he construed it at all." *Id.* at 573 (emphasis added). *See also id.* at 570 ("[T]he arbitrator focused on the arbitration clause's text, analyzing (*whether correctly or not* makes no difference) the scope of both what it barred from court and what it sent to arbitration.") (emphasis added); *id.* at 572 ("Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading."); *id.* at 569 ("Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, *regardless of a court's view of its (de)merits.*") (emphasis added) (internal quotation marks omitted).

In his concurrence, Justice Alito (joined by Justice Thomas), did not mince his words in expressing his disapproval of the arbitrator's decision. "If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685) (emphasis added).

In this case, of course, § 10(a)(4) of the FAA does not apply because the parties submitted the issue of class arbitration to a court, not an arbitrator. Therefore, the Court is free to "review[] the [Ninth Circuit's] interpretation *de novo*,"

Oxford Health, 569 U.S. at 574. In so doing, the Court should have "little trouble concluding that [the Ninth Circuit] improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 685).

In short, this case allows the Court to do what it could not do in *Oxford Health*, due to the constraints imposed by the FAA. The Court can now reject an erroneous interpretation of a standard bilateral arbitration agreement and reinforce its holding in *Stolt-Nielsen*. Simply put, there can be no contractual basis authorizing class arbitration under the FAA when, as here, two parties have only agreed to arbitrate their disputes.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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